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RE LEONG NYUK WENG, EX P PUBLIC BANK BHD

HIGH COURT SABAH & SARAWAK, MIRI
ABDUL AZIZ RAHIM JC
b [BANKRUPTCY PROCEEDINGS NO: 29-151-2002 (MR)]
17 JUNE 2003

CIVIL PROCEDURE: *Stay of proceedings - Bankruptcy, stay of creditor's petition - Appeal against decision of senior assistant registrar refusing application for stay pending final determination of debtor's appeal -*
c *Whether appeal misconceived and procedurally incorrect - Rules of the High Court 1980, O. 55 r. 12*

BANKRUPTCY: *Creditor's petition - Application to strike out - Whether appellant a 'debtor' within the meaning of s. 3(3)(a) and (b) Bankruptcy Act 1967 - Whether debtor came within s. 5(1)(d) Bankruptcy Act 1967 -*
d *Whether creditor's petition defective - Bankruptcy Act 1967, ss. 3(3)(a), (b), 5(1)(d)*

These were two appeals by the appellant/debtor. The first was the debtor's notice of appeal to the judge in chambers against the decision of the senior
e assistant registrar ('SAR') refusing the debtor's application in encl. 26 to dismiss the bankruptcy notice and creditor's petition on the ground that debtor was, for one year preceding the presentation of the petition, not a resident in Sarawak but an ordinary resident in Brunei. He also contended that the creditor's petition was ill-conceived because the debtor was not, at
f the time of filing of the petition, a 'debtor' within the meaning of s. 3(3)(a) and (b) of the Bankruptcy Act 1967 ('the Act'). The second appeal was against the decision of the SAR refusing the debtor's application for a stay of the creditor's petition pending full and final determination of the debtor's appeal in encl. 26.

g **Held:**

[1] Pursuant to O. 55 r. 12 of the Rules of the High Court 1980, the law requires that a party seeking a stay should, at the first instance, apply to the presiding officer who made the order against which the
h party is appealing and if he fails to get the stay there, to then apply afresh seeking the stay before an appellate court. Thus, the appeal by the debtor to the judge in chambers against the decision of the SAR refusing a stay of the creditor's petition was misconceived and procedurally incorrect. (p 264 d, g)

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[2] Under s. 3(3)(a) and (b) of the Act, any person who was personally present in Malaysia or has a place of residence in Malaysia at the time he committed an act of bankruptcy as stipulated in s. 3(1) of the Act – as in this instance – is deemed to be a 'debtor' for the purpose of the Act. (p 269 b)

[2a] Although the debtor's affidavit evidence may have shown that he was residing in Brunei, it was insufficient support of any contention that the debtor had changed his domicile of origin, Sarawak, to that of his choice, Brunei. The debtor's domicile was still in Sarawak; therefore, he came within the first limb of s. 5(1)(d) of the Act, and the creditor may petition for adjudication and receiving orders against the debtor if the debtor is domiciled in Malaysia regardless of whether or not the debtor's place of residence has changed. Hence, the creditor's petition was not defective for want of jurisdiction. (pp 268 f-g & 269 e-g)

[Appeals dismissed.]

Case(s) referred to:
Ang Geck Choo v. Wong Tiew Yong [1997] 3 CLJ Supp 201 HC ***(refd)***
Re Low Kok Tuan ex p Arab-Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1), (3), 5(1)(d), 97
Bankruptcy Rules 1969, rr. 101(1), (2)
Rules of the High Court 1980, O. 4 r. 2, O. 55 r. 12, O. 56 r. 4

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 444

For the creditor - Bernard Chung; M/s Liew, Lu & Co
For the debtor - Merlyn Toh; M/s Yi & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Rahim JC:
There are two appeals before me. One is in respect of encl. 38 which is the debtor's notice of appeal to judge in chambers dated 21 March 2003 against the decision of the senior assistant registrar refusing the debtor's application in encl. 26 to dismiss and set aside the bankruptcy notice and the creditor's petition on the ground that the debtor was for one year

preceding the presentation of the petition not a resident in the state of Sarawak but an ordinarily resident in Brunei. The other is in respect of encl. 49 which is the debtor's notice of appeal to judge in chambers dated 26 April 2003 also against the decision of the SAR refusing the debtor's application for stay of the creditor' petition dated 6 August 2003 (encl. 40) pending full and final determination of the debtor's appeal to judge in chambers as regards to encl. 26.

I will deal with the second appeal first, that is the appeal against the decision of the SAR refusing the debtor's application for stay of the creditor's petition in encl. 40.

The facts leading to this appeal are as follows. On 24 May 2002 the creditor filed the bankruptcy notice to enforce the judgment dated 10 May 2002 entered against the debtor. The bankruptcy notice was personally served on the debtor on 16 July 2002. The debtor did not comply with the bankruptcy notice. On 6 August 2002 the creditor filed the creditor's petition together with affidavit of truth of statement in petition of Mr. Wong It Teck dated the same date. The creditor's petition was served on the debtor by substituted service by way of advertisement in the "Miri Daily News" newspaper pursuant to an order for substituted service made by the court on 23 September 2002. The debtor filed the notice of intention to oppose the petition on 4 October 2002. On 8 October 2002 the debtor filed his summons in chambers as in encl. 26 to set aside the creditor's petition. The debtor's summons in chambers was dismissed by the SAR on 20 March 2003. The debtor then filed an appeal to judge in chambers against that decision on 21 March 2003, the following day. Whilst the appeal is pending before the judge in chambers, the debtor took out another summons in chambers (encl. 40) applying for the stay of the creditor's petition pending the appeal on the ground that if the stay is not allowed the debtor's appeal to judge in chambers against the decision of the SAR refusing to set aside the creditor's petition will render the appeal nugatory. This is the sole ground on which the appeal as to the refusal of the SAR to grant the stay is based.

In order to appreciate the concern of the debtor as to why the stay should be granted, it is necessary to bear in mind the ground on which the debtor had opposed the creditor's petition. The debtor argued that the creditor's petition is ill-conceived because the debtor is not a 'debtor' within the definition of s. 3(3) of the Bankruptcy Act 1967 ("the Act"). The debtor

argued that before a debtor can be said to have committed any acts of bankruptcy as provided in s. 3(1) of the Act, the debtor must be a 'debtor' within the definition of s. 3(3) of the Act; and the onus is on the creditor to show that is so. Therefore, it is necessary for the stay to be granted so that the appeal, if successful, would not be nugatory and there will not be a waste of judicial time hearing the creditor's petition.

In opposing this appeal by the debtor, the creditor raises two issues. Firstly whether this appeal is properly construed and secondly whether there is sufficient ground for this court to grant the stay pursuant to s. 97 of the Act. On the first issue, it was submitted by the counsel for the creditor that this appeal is ill-conceived. The counsel for the creditor relied on O. 55 r. 12 of the RHC 1980 to support his contention. That order reads:

> An appeal shall not operate as a stay of execution under the decision appealed against except in so far as the Court appealed from or the High Court may order, and any application for stay shall be made in the first instance to the Court appealed from.

Under this rule it is crystal clear that an application for stay in the first instance must be made to the court whose decision is being appealed upon. The words 'and any application for stay shall be made in the first instance to the court appealed from' makes it mandatory that any party to a decision who wishes for stay of execution of that decision must apply to the court of the first instance. This is trite law. It is implicit from the words 'except in so far as the court appealed from or the High Court may order' that in the event the court of the first instance refuses to grant the stay order the party concerned may apply to the High Court for the stay. In my view this application is by way of fresh application for stay and not by way of an appeal on the refusal of the court of the first instance to grant the stay. I am of that view because it appears to me that it makes no sense for the said rule (ie, O. 55 r. 12) to stipulate that an appeal shall not operate as a stay if stay application pending appeal is also subject to appeal as in normal appeal before a superior court. Moreover, it is to be noted that O. 55 RHC 1980 is a provision that governs appeals against decisions of the subordinate courts and statutory bodies. To me those decisions are final decisions in whatever matters that were decided and that is why they were subject to appeals. Thus the parties in whose favour the decisions were made should not be deprived of the fruits of their successful litigations, except of course if a court of competent jurisdiction grants a stay.

At this juncture I also to refer to O. 56 r. 4 which provides that:

> Except so far as the Court may otherwise direct, and appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

In this rule (ie, O. 56 r. 4) the words 'the court may otherwise direct' do not suggest that the court may direct otherwise if there is an appeal. The language used is quite broad to invite an interpretation that the court may direct if there is an application for stay is made to it. It is also to be noted that the 'court' in O. 56 r. 4 refers to the High Court before whom the appeal is pending.

In *Re Low Kok Tuan Ex Parte Arab-Malaysian Merchant Bank Berhad* [1997] 4 CLJ 185 the issue whether there is an appeal against an order refusing a stay was discussed. In that case the learned judge said at p. 192:

> In my opinion, the provisions relating to an application for a stay are only too well known. Simply to recapitulate the position here, what is required by the law is for the party seeking a stay, at the first instance to apply to the presiding officer who made the order against which the party is appealing and if he fails to get the stay there, he should then apply afresh seeking the stay before an appellate court.

In *Re Low*'s case above, as in this appeal, the appellant was also appealing against the decision given by the deputy registrar refusing a stay; the court in that case ruled that the appeal was misconceived. After making reference to O. 55 and O. 4 r. 2 of the RHC 1980 the court ruled at p. 192 as follows:

> Accordingly, a party wishing to seek an order for stay from a decision given by the Deputy Registrar must be in the first instance go before the Deputy Registrar and if fails to get a stay there, then he may come before the judge by way of a fresh application for a stay and not by way of an appeal.

Therefore it is my judgment that the appeal by the debtor/appellant to the judge in chambers against the decision of the SAR refusing a stay of the creditor' petition on an application by the debtor *vide* encl. 40 is misconceived and procedurally incorrect. Accordingly I dismiss this appeal as in the notice of appeal to a judge in chambers in encl. 49. In the circumstances I do not think it is necessary for me to go into the second

ground raised by the creditor/respondent, which is the merits of the appeal on the refusal of the stay order. Moreover, in the second appeal before me the debtor/appellant is also challenging the SAR's decision in refusing to set aside the creditor's petition, which I am going to deal with now.

In the second appeal before me, the debtor/appellant argued that the creditor petition is ill-conceived because the debtor was not, at the time of the filing of the petition, a 'debtor' within the meaning of s. 3(3) of the Act in particular paras (a) and (b) of that section.

To appreciate the scope of this argument, I reproduce the whole of s. 3(3) of the Act below:

> (3) The word 'debtor' in this Act shall be deemed to include any person who at the time when the act of bankruptcy was done or suffered by him:
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> (a) was personally present in Malaysia; or
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> (b) ordinarily resided or had a place of residence in Malaysia; or
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> (c) was carrying on business in Malaysia either personally or by means of an agent; or
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> (d) Malaysia was a member of a firm or partnership which carried on business in.

As mentioned earlier, for the purpose of this second appeal, only paras (a) and (b) of s. 3(3) above are relevant.

Before proceeding any further, two things to be noted about s. 3(3). First, that section is a deeming section and it is non exhaustive definition. The use of the expression "shall be deemed to include' clearly points this out. What this means is that besides giving the word 'debtor' its ordinary meaning, the meaning of that word, for the purpose of the Act, is expanded and deemed to include those who come within paras (a) to (d) of that section. Secondly, the description of the person deemed to be a debtor under paras (a) to (d) above is in the past tense. This means that under those paragraphs a person is deemed to be a debtor even though he is no longer a person, or is no longer carrying on business, as envisaged in those paragraphs if at the time he committed or suffered the act of bankruptcy as defined in s. 3(1) of the Act, he was the person that came within those paragraphs.

In the present case the act of bankruptcy that is relevant under s. 3(1) of the Act is para (i) that is where the creditor had obtained a final judgment against the debtor for a liquidated amount and that amount remained unsatisfied even after the bankruptcy notice had been issued to the debtor. In this regard it is not disputed in this appeal that the bankruptcy notice dated 24 May 2002 was served personally on the debtor on 16 July 2002 at which time the debtor was personally in Malaysia, more particularly in Miri Sarawak.

As to the issue of residence of the debtor/appellant it was submitted that the debtor/appellant was not resident in Malaysia at the time he committed or suffered the bankruptcy act. It was alleged that he was resident in Brunei.

Halsbury's Laws of England 4th edn. at para 444 has this to say on the meaning of 'residence':

> The terms 'residence' bears varying meanings according to its context, and great caution must be exercised before authorities on the meaning of 'residence' in such contexts as bankruptcy, taxation, or the old poor law provisions, are applied in other contexts. In particular, it is clear that some degree of permanence is required for the acquisition of residence in some contexts, but not, or to lesser extent, in others.
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> Generally, 'residence' means physical presence other than casually or as a traveler. In considering whether residence is established the court considers a man's whole environment, especially in relation to his wife and family, not merely his physical situation. In some cases, a man may be resident in England despite a temporary absence; and he may be held to be resident in two or more countries. It is possible to be resident in a country without owning or enjoying exclusive possession of any premises there.

On the same issue, I am also mindful of the fact that the debtor was in possession of a valid residence visa in Brunei from 7 June 2001 to 12 Mei 2003 as submitted by the counsel for the debtor in her written submission and which was supported by exh. L2 of the debtor's affidavit. However this proves nothing more than that the debtor was given legal permission to stay in Brunei on those dates. It does not in my view conclusively show that the debtor has changed his residence. It is also pertinent to note that the residence visa held by the debtor as exhibited by L2 is not given for a continues period but instead was broken up into several periods with short intervals in between. In the circumstances, it is not reasonable to conclude

that the debtor has changed his residence. Another factor which I think shows that the debtor has no intention to change his residence is that he had made a purchase of a house in Miri located at survey Lot 4793 of parent Lot 1728 Lambir Land District Luak, Miri Sarawak. This fact is not in dispute, (see para 13(g) of Wong It Teck affidavit in opposition I, for the judgment creditor, affirmed on 16 October 2002). Therefore I find that the appellant is a 'debtor' within the meaning of s. 3(3) of the Act.

In his affidavit in support of his application to set aside the bankruptcy notice and the creditor petition encl. 26, the debtor deposed in para. 10 of his affidavit that he was not domiciled in Miri or any town in the state of Sarawak within one year before the date of presentation of the petition. The debtor also deposed in para 7 of the same affidavit that he had moved to stay and work in Negara Brunei Darussalam is currently staying and working in that country. The debtor exhibited the pages from his Malaysian International Passport No. K7769596 issued on 5 May 1997 and expired on 5 May 2002 and Malaysian Passport No. K11293926 issued on 30 April 2001 and expired on 30 October 2006 as exh. L2 in his affidavit. The debtor also exhibited his Brunei identity card as exh. L3. Therefore the debtor argued that he resides in Brunei and the High Court in Sabah and Sarawak has no jurisdiction over him in this matter. He further argued that the bankruptcy proceedings, the bankruptcy notice and the creditor petition are bad in law because it contravenes s. 5(1)(d) of the Act and r. 101(1) and 101(2) of the Bankruptcy Rules 1969. As to s. 5(1)(d) it provides as follows:

> 5(1) The creditor shall not be entitled to present a bankruptcy petition against a debtor unless:
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> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) 'the debtor is domiciled in Malaysia or in any state or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or agent or manager.

As can be seen there are several limbs to s. 5(1)(d) and each of the limbs in my view is to be read disjunctively. In other words, a creditor need only to satisfy one of the limbs of s. 5(1)(d) to come within its purview. In my view although the pages of the debtor's passports showed that he had travelled frequently to Brunei and that he holds a Brunei identity card it is not conclusive that he has taken residence in Brunei. In any case it does not prove that the debtor has changed his domicile. 'Domicile' and 'residence' are two different concepts. The principle is that a person may have more than one residence but he has only one domicile that is his domicile of origin – his place of birth. However a person can also change his domicile of origin to his domicile of choice. But it requires strong evidence to show that he has abandoned his domicile of origin and adopted his domicile of choice. In *Ang Geck Choo v. Wong Tiew Yong* [1997] 3 CLJ Supp 201 the learned judge said at p. 204:

> There are too many authorities which have pronounced the impossibility of laying down an absolute definition of domicile, though in Malaysia illustrations have been resorted to so as to overcome this lacuna (see *Re Bhagwan Singh, Decd* [1964] MLJ 360). What is trite is that a place of domicile may be changed by several reasons, one of which is the metamorphosis to a domicile of choice by a person's own act from that of a domicile of origin by birth. This domicile of choice on the other hand may not be permanent as the person concerned may abandon it which results in the return to the domicile of origin until a fresh place of domicile is acquired. In other words, during the time when a person moves off to another place and takes up domicile there, the domicile of origin is held in suspension, with the latter to be reactivated only if the domicile of choice has been abandoned. It is no coincidence that it is not possible to have more that one domicile at the same time.

In our case, the affidavit evidence of the debtor may have shown that he is residing in Brunei, which I have said earlier is not conclusive, it is not sufficient support any contention that the debtor has changed his domicile of origin, which is Sarawak, to that of his choice which is Brunei. That being the case, the debtor is caught by the first limb of s. 5(1)(d) of the Act. It is pertinent to note that other than saying that the bankruptcy proceedings against him is contravening the provisions of s. 5(1)(d) of the Act, the debtor did not claim that he has changed his domicile of origin in his affidavit; even if he had done so, there is no evidence being offered in the affidavit to support such claim.

As I have pointed earlier s. 3(3) is a definitive section in that it defines what is meant by the expression 'debtor' for the purpose of the Act. In fact in my view that section creates a legal fiction by way of an enlargement of the ordinary meaning of the word 'debtor' to include persons specified in paras (a) to (d) of that section. Under s. 3(3) of the Act any person who was personally present in Malaysia, or who was ordinarily resided or has a place of residence in Malaysia, or who was carrying on business in Malaysia either personally or through an agent, or who was a member of a firm or partnership which carrying on business in Malaysia at the time he committed an act of bankruptcy as stipulated in s. 3(1) of the Act is deemed to be a debtor for the purpose of the Act. The rationale for this legal fiction, in my view, is that a debtor is not to be excused in paying his debt to his creditors by leaving this country after he had committed the act of bankruptcy and thus puts him beyond the jurisdiction of this court by setting up a defence that he is not longer present in Malaysia, or no longer residing or having a place of residence in Malaysia, or no longer carrying business in Malaysia either personally, through agent or by being a member of a firm or partnership which carrying on business in Malaysia at the time the bankruptcy proceedings is commenced against him. On the other hand, s. 5(1), stipulates the conditions under which the creditor may present a bankruptcy petition. Section 5(1)(d) provides for conditions that are similar to that of s. 3(3) with one exception that is the creditor may also present the petition if the debtor is domicile in Malaysia or in any State in Malaysia. What this means is this: the creditor may petition for adjudication and receiving orders against the debtor if the debtor is domicile in Malaysia regardless whether the debtor's place of residence has changed.

In this case, even if I am wrong on my earlier conclusion that there is insufficient evidence to conclude that the debtor has changed his residence to Brunei, the debtor's domicile is still in Sarawak; therefore the debtor comes within the first limb of s. 5(1)(d). In the premise, the creditor petition is not defective for want of jurisdiction.

In the circumstances I affirmed the senior assistant registrar's decision and disallowed the appeal, with cost.